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No. 74-489

In the Supreme Court of the United States

OCTOBER TERM, 1974

DEPARTMENT OF THE AIR FORCE, ET AL., PETITIONERS

v.

MICHAEL T. ROSE, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

ROBERT H. BORK,
Solicitor General,
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The Solicitor General, on behalf of the Department and Secretary of the Air Force and the Superintendent, Commandant of Cadets and Executive for Honor and Ethics of the Air Force Academy, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, pp. 1A–23A) is reported at 495 F. 2d 261. The opinion of the district court (App. C, *infra*, pp. 26A–38A) is not reported.

JURISDICTION

The judgment of the court of appeals (App. D, *infra*, pp. 39A–40A) was entered on March 29, 1974. A

timely petition for rehearing was denied on May 29, 1974 (App. B, *infra,* pp. 24A–25A). On August 20, 1974, Mr. Justice Marshall extended the time for filing a petition for a writ of certiorari to September 26, 1974, and on September 16, 1974, he further extended the time to October 26, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether exemption 6 of the Freedom of Information Act, which exempts from disclosure "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy," covers all personnel files rather than, as the court of appeals held, only those whose disclosure "would constitute a clearly unwarranted invasion of personal privacy."

2. Whether exemption 6 bars disclosure of summaries of proceedings against cadets at the Air Force Academy accused of violation of the Honor and Ethics Codes, because such disclosure would constitute "a clearly unwarranted invasion of personal privacy."

3. Whether the exemption from disclosure in exemption 2 of the Freedom of Information Act for matters "related solely to the internal personnel rules and practices of an agency" is inapplicable, as the court of appeals held, if the material has "a substantial potential for public interest outside the Government."

STATUTE INVOLVED

The Freedom of Information Act, 5 U.S.C. 552, provides in pertinent part:

> (a) Each agency shall make available to the public information as follows:
>
> * * * * *
>
> (3) Except with respect to the records made available under paragraphs (1) and (2) of this subsection, each agency, on request for identifiable records made in accordance with published rules stating the time, place, fees to the extent authorized by statute, and procedure to be followed, shall make the records promptly available to any person. On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant.
>
> * * * * *
>
> (b) This section does not apply to matters that are—
>
> * * * * *
>
> (2) related solely to the internal personnel rules and practices of an agency;
>
> * * * * *
>
> (6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;
>
> * * * * *

STATEMENT

This is a suit under the Freedom of Information Act, 5 U.S.C. 552, to compel disclosure of summaries of Air Force Academy Honor and Ethics Code cases. The Air Force Academy Honor Code states: "We will not lie, steal, or cheat, nor tolerate among us anyone who does." The Code is administered through a Cadet Honor Committee, composed of cadets, which conducts hearings for cadets accused of Honor Code violations. The Honor Committee's "Procedures for Honor Hearing" state: " * * * all matters discussed at the hearing are confidential and should not be discussed * * * with anyone other than an Honor Representative [a cadet selected by his fellows to administer the Code]." (App. 105, 147, 165.)[1]

The Cadet Honor Committee summarizes the significant facts of each case in detailed written case summaries which are distributed "for official use only" within the Academy to Honor Representatives and others charged with administration of the Code, on a "need to know" basis. Similarly, the Ethics Committee at the Academy, composed of cadets, administers the Ethics Code and conducts Ethics Code hearings for cadets which are similarly confidential. The Ethics Code case summaries are also distributed solely within the Academy "for official use only." (App. 46, 164–165, 208, 215, 226, 234, 245, 252.)

Plaintiffs in this suit were law students seeking disclosure of the case summaries, with the names of cadets deleted, to use "in the form of footnotes for

[1] "App." refers to the joint appendix in the court of appeals, a copy of which is being lodged with the Clerk of this Court.

illustration" in a law review note on disciplinary procedures at the military academies (App. 212, 215). The case summaries will also be maintained for public inspection in the library of the New York University Law School (letter of plaintiffs' counsel to court of appeals concerning mootness, January 7, 1974). During lengthy interviews with plaintiff Rose, Academy officials gave him the Honor Code, the Honor Reference Manual, Lesson Plans, Honor Hearing Procedures, and various other materials explaining the Honor and Ethics Codes (App. 207, 211, 214, 224). They denied access to the case summaries, however, because the summaries are so detailed that, even with the names deleted, "[s]ome cases may be recognized by the reader by the circumstances alone without the identity of the cadet given" and "[t]here is no way of determining just how these facts will or could be used" (App. 35, 211a).

The Superintendent of the Air Force Academy, the Commandant of Cadets and the Commandant's Executive for Honor and Ethics each filed in the district court affidavits stating that cadets who had been the subjects of Code hearings could be damaged for the balance of their lives if a reader connected the incident described in the case summary with a particular cadet (App. 35, 211a, 238, 244). See Rose, *A Prayer for Relief*, p. 106, n. 631 (New York University Law School, 1973).

The United States District Court for the Southern District of New York held that the case summaries are exempt from mandatory disclosure under exemption 2 of the Act, 5 U.S.C. 552(b)(2), as "matters that are * * * related solely to the internal personnel rules

and practices of an agency" (App. C, *infra,* pp. 33A–35A). On appeal, the appellees urged affirmance on that ground, and also reiterated their contention, rejected by the district court (App. C, *infra,* pp. 29A–32A), that the case summaries are exempt from disclosure under exemption 6 of the Act, 5 U.S.C. 552(b)(6), as "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy."

A divided court of appeals reversed. The court held that the case summaries are not covered by exemption 2 because they "have a substantial potential for public interest outside the Government" and "have great impact on the lives and careers of subject cadets" and therefore are different "from matters of daily routine like working hours, which, in the words of Exemption Two, do relate '*solely* to the internal personnel rules and practices of an agency' [Emphasis added.]" (App. A, *infra,* pp. 7A–8A).

The court recognized that the case summaries are "personnel" or "similar" files within the meaning of exemption 6, and that "identification of disciplined cadets—a possible consequence of even anonymous disclosure—could expose the formerly accused men to lifelong embarrassment, perhaps disgrace, as well as practical disabilities, such as loss of employment or friends" (App. A, *infra,* pp. 10A–13A). But the court held that exemption 6 was inapplicable to the case summaries in view of its "narrow" reading of the exemption, and the need to "compromise between individual rights 'and the preservation of public rights

to government information' " (App. A, *infra,* pp. 5A–9A, 15A).

Since the appellees had failed to "carry th[e] burden" of establishing the applicability of exemption 6, the court required the Academy to "produce the summaries themselves in court" for *in camera* inspection. The court stated that it is "highly likely that the combined skills of court and Agency, applied to the summaries, will yield edited documents sufficient * * * to safeguard affected persons in their legitimate claims of privacy," by deleting names and "personal references and all other identifying information" (App. A, *infra,* pp. 14A–15A).[2]

Judge Moore dissented on the ground that the majority decision overrode the specific prohibition of exemption 6 by allowing plaintiffs to "pry into and seek to disclose the former transgressions of Air Force cadets," at a "time when the courts are more and more being called upon to protect an individual's character from being unnecessarily besmirched" (App. A, *infra,* pp. 18A–19A). Judge Moore also noted: "Deletion of names suggested by the majority would be of no avail. In addition to names, identifiable facts would have to be eliminated. Eliminating all determinative essentials would only create a hypothetical situation" (App. A, *infra,* p. 22A).

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[2] The court also recognized that courts retain broad equitable power to decline to order disclosure which would damage the public interest, but held that the issue "is not a substantial one" in the context of exemption 6 "since the language of the exemption requires a court to exercise a large measure of discreation" (App. A, *infra,* p. 17A).

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REASONS FOR GRANTING THE WRIT

This case presents important and recurring questions of statutory interpretation involving the scope of exemptions 6 and 2 of the Freedom of Information Act. The narrow interpretation that the court of appeals has given to those exemptions authorizes the disclosure of highly damaging and derogatory material in government personnel files. The decision permits such disclosure on the unsupported assumption that by excising names and other identifying information the particular individuals involved in the Air Academy Honor Code proceedings cannot be identified. The decision of the court of appeals, if allowed to stand, will defeat the intention of Congress to protect the confidentiality of government material which those two exemptions cover.

1. a. Exemption 6 of the Freedom of Information Act excepts from the Act's disclosure requirements "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." The court of appeals read this exemption as covering only those personnel files whose disclosures would constitute "a clearly unwarranted invasion of personal privacy" (App. A, *infra,* pp. 10A, 12A–13A). We submit, however, that the determination whether disclosure would constitute such an invasion of personal privacy is required only in the case of "similar files," and that once it is determined that particular files are "personnel" or "medical," the judicial inquiry is at an end. In other words, in exemption 6 Congress itself made the determination that disclosure of "personnel and medical files" would constitute an impermissible invasion of personal privacy.

The summaries of the Honor and Ethics Code violations involved in this case are "personnel" files. They relate to conduct by the cadets at the Academy, and are the basis for disciplinary action such as involuntary resignation or expulsion. They are just as much a part of a cadet's "personnel" file as the records of his academic and military performance. As such, they are protected from disclosure by exemption 6.

Congress did not intend the courts, before applying exemption 6 to personnel files, to determine whether disclosure of those files would constitute "a clearly unwarranted invasion of personal privacy"—an inquiry which, the court recognized, "involves an essentially unique investigation into the nature of the privacy interest invaded and the extent of the proposed invasion, viewed in the light of contemporary mores and sensibilities as applied to the particular facts" (App. A, *infra,* p. 10A).

b. The language of the exemption does not compel the court of appeals' interpretation of it. To the contrary, the more reasonable interpretation is that Congress recognized that personnel and medical files traditionally contain confidential material that should be protected against disclosure and that other files also may contain such material. It therefore provided for confidential treatment of other files that meet the nondisclosure standard that inheres in personnel and medical files—the protection against disclosure that would constitute a clearly unwarranted invasion of personal privacy. Congress certainly did not intend to

subject the millions of government personnel and medical files to the balancing standards and editing procedures applied in this case, as a condition to maintaining their confidential character.

Indeed, in the case of medical files, Congress was legislating in the light of the well-established privilege covering the confidentiality of the doctor-patient relationship. If exemption 6 covers only those medical files that meet the "clearly unwarranted invasion" standard for nondisclosure, many doctor-patient communications that hitherto have been confidential would be subject to disclosure. Congress did not intend exemption 6 to have that effect. If the invasion of privacy requirement that the court of appeals read into the personnel files portion of exemption 6 is correct, however, it also would cover the medical files portion of that provision.

c. The legislative history of exemption 6 confirms that Congress intended to provide complete protection for the confidentiality of personnel and medical files without requiring the government also to show that disclosure of material in those files would constitute a clearly unwarranted invasion of personal privacy. The report of the House Committee on Government Operations stated that exemption 6 excluded from disclosure "those kinds of files the disclosure of which *might* harm the individual. The exemption is intended to cover detailed Government records on an individual which *can* be identified as applying to that individual * * * " (emphasis added). H. Rep. No. 1497, 89th Cong., 2d Sess., p. 11. Congress intended that the Act would not be used to expose the "vast amounts of personal data" collected by the government "usually for limited purposes," such as "health, welfare, and selective service records [which] are highly personal to the person involved * * *." S. Rep. No. 813, 89th Cong., 1st Sess., p. 9. The Senate Committee stated: "At the same time that a broad philosophy of 'freedom of information' is enacted into law, it is necessary to protect certain equally important rights of privacy with respect to certain information in Government files, *such as medical and personnel files*" (*id.* at 3; emphasis added).

d. Although, as shown below, permitting disclosure of the Honor and Ethics Code summaries is likely to have grave and unfair consequences for a large number of Air Force officers and cadets, it is doubtful whether the decision of the court of appeals could be limited to that particular group. Rather, the rationale of the court of appeals' decision is likely to be applied to permit disclosure of a wide variety of other government personnel files, including those of the "Veterans Administration, Department of Health, Education, and Welfare, Selective Service, etc." (S. Rep. No. 813, *supra*, at 9), which Congress intended to keep confidential when it enacted exemption 6.

2. If, contrary to our submission, the summaries are not personnel files or if the "clearly unwarranted invasion of personal privacy" requirement in exemption 6 applies to personnel files, the court of appeals nevertheless improperly required an *in camera* district court examination of the summaries to eliminate information that could result in identifying the cadets involved in the violations. The court of appeals' own analysis of the summaries shows that exemption 6

bars their disclosure. Cf. *Environmental Protection Agency* v. *Mink*, 410 U.S. 73, 81, 93–94.

The court of appeals apparently believed that the harm that might result to the cadets from disclosure of the summaries could be minimized or eliminated by the *in camera* screening and excision it ordered. It nevertheless recognized that even this procedure might not protect the cadets from disclosure of their involvement in the Code violations—a disclosure that could have a serious adverse impact upon their subsequent careers, both in the military and elsewhere.

The court stated that "identification of disciplined cadets—a possible consequence of even anonymous disclosure—could expose the formerly accused men to lifelong embarrassment, perhaps disgrace, as well as practical disabilities, such as loss of employment or friends" (App. A, *infra*, p. 13A). As the court noted,

> [A] senior officer and ex-cadet might, upon reading a summary or a reference to it, realize for the first time that a man under his command had once been the subject of Academy discipline. It would be cold comfort to the junior officer to be told that his chief had always "known" this fact anyway, although he had long forgotten it or had never made the ultimate connection among various bits of knowledge until the article jogged his recollection. [App. A, *infra*, p. 12A.]

Similarly, the court recognized:

> [P]ublication of even anonymous summaries could expose the histories of formerly accused cadets to persons other than Air Force officers. Despite the continuing injunction of secrecy, no one can guarantee that all those who are "in the know" will hold their tongues, particularly years later when time may have eroded the fabric of cadet loyalty [App. A, *infra*, p. 12A.]

The ineffectiveness of excision of names and other identifying facts as a means of maintaining the confidentiality of persons named in government reports and files is strikingly illustrated by the recent case involving government files relating to Ezra Pound. A researcher, who had received data connecting Ezra Pound from the files of the FBI, identified a number of individuals who had furnished data on Pound to the Bureau, despite the fact that the names and addresses of such individuals, as well as other pertinent identifying data, were deleted from the information furnished to the researcher in an attempt to "redact" the files to avoid such identification (see The New York Times, Book Review Section, p. 47, April 21, 1974; 119 Cong. Rec. S9333–S9334 (daily ed., May 30, 1974)).

The reason that such "editing" of the data is likely to be ineffective in preserving the anonymity of the people involved is that where the entire group itself is relatively small, even a few details may enable people familiar with the subject to identify the particular individuals involved. The number of cadets in the Air Force Academy at any one time is sufficiently small that the Honor and Ethics Code summaries, even with significant deletions, are likely to be sufficiently suggestive and informative to enable those familiar with the Academy to draw accurate inferences concerning the identity of the cadets involved in the particular violations described.

Congress in exemption 6 did not intend to authorize the courts to require disclosure of files covered by that exemption on the basis of excision of "personal references and all other identifying information" in the files—a process which, by its very nature, cannot adequately protect the confidentiality that Congress wished to insure by exemption 6.

The court of appeals stated (App. A, *infra*, p. 15A) that if the deletion of "personal references and all other identifying information" is, "in the opinion of the district judge," "not sufficient to safeguard privacy, then the summaries should not be disclosed to appellants." This statement is inconsistent with the court's own view that it is "highly likely" that such deletion would be adequate to accomplish that objective—a view reflecting the court's belief that exemption 6 constitutes "a workable compromise between individual rights 'and the preservation of public rights to government information'" (App. A, *infra*, pp. 14A–15A). Despite the court of appeals' suggestion that the district court ultimately might decline to disclose some of the summaries, the practical effect of its decision will be to permit disclosure of material that Congress intended to keep confidential pursuant to procedures that Congress did not contemplate.

The probable result of the court of appeals' decision in this case would be a serious violation of the right of privacy of a large number of cadets at the Air Force Academy. This case, therefore, implicates an additional factor beyond the usual Freedom of Information Act case, in which the competing considerations are the public interest (1) in obtaining information

about the government and (2) in avoiding disclosure that may interfere with the proper functioning of government. In exemption 6 of the Freedom of Information Act, Congress expressly undertook to protect the constitutional right of privacy (see *Roe* v. *Wade*, 410 U.S. 113, 152). Congress did not intend to permit the serious invasions of that right which are likely to be the consequence of the court of appeals' interpretation of that exemption.[3]

3. Exemption 2 excepts from disclosure matters "related solely to the internal personnel rules and practices of an agency." The court of appeals ruled that this exemption was inapplicable here because the case summaries "have a substantial potential for public interest outside the Government" (App. A, *infra*, p. 8A). The court's apparent rationale was that because of that potential the summaries do not relate "solely" to internal personnel rules and practices (*ibid.*). This ruling rests upon a misinterpretation of exemption 2, and reads into the exemption a qualifi-

[3] Compare *Rural Housing Alliance* v. *United States Department of Agriculture*, 498 F. 2d 73 (C.A.D.C.), where the court of appeals, in dealing with the category of "similar" files, instructed the district court on remand to "reconsider and reevaluate" a government affidavit which contended that the files contained personal information so detailed that the privacy of the named individuals could not be adequately protected by a deletion process (*id.* at 78). In contrast to the Second Circuit's view that exemption 6 must be given a "narrow" construction (App. A, *infra*, pp. 5A, 9A), the District of Columbia Circuit declared that exemption 6 is "phrased broadly to protect individuals from a wide range of embarrassing disclosures" (498 F. 2d at 77). The files involved there were statements of and records concerning persons who had allegedly been discriminated against by the Farmers Home Administration.

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cation that Congress did not include and that would seriously weaken it.

The fact that particular government documents relating to internal personnel rules and practices may "have a substantial potential for public interest outside the Government" does not change their character as matters that relate "solely" to those rules and practices. There frequently will be substantial public interest in matters that relate "solely" to internal agency personnel rules and practices. The standard Congress promulgated to protect the confidentiality of those rules and practices, however, is whether the matters sought to be disclosed relate "solely" to them and not whether there may be a substantial public interest outside the government with respect to them.[4]

The present case illustrates this distinction. The Honor and Ethics Code summaries are written by cadets for use by other cadets and Academy officials in connection with the operation and administration of the Academy and the maintenance of the voluntary Honor and Ethics Codes. The codes provide the standards by which the cadets guide their own conduct while at the Academy. The Code hearings are confidential—attended solely by cadets and appropriate Academy officials.

The case summaries thus relate "solely to the internal personnel rules and practices" of the Academy.

[4] This analysis equally applies to the court of appeals' reasoning that the case summaries do not relate "solely" to internal personnel rules and practices for the additional reason that they "have great impact on the lives and careers of subject cadets" (App. A, *infra*, p. 8A).

They involve the discipline, training and fitness of candidates. They are administered and enforced by the cadets themselves and exist wholly apart from the formal system of courts martial and the Uniform Code of Military Justice (App. 29–30, 144, 147, 164–165, 173, 208, 225, 226, 234).

The character of the Code summaries as matters that relate solely to the Academy's internal personnel rules and practices is not altered by the fact that there may be substantial public interest in the way the Codes operate. Such public interest also exists with respect to other types of government internal procedures that the legislative history of exemption 2 shows Congress specifically intended it to cover, such as the Treasury Department's instructions for the proper conduct of a "stakeout" or the manuals instructing auditors of government contractors how to detect irregularities.[5] That consideration, however, does not except such material from the coverage of exemption 2. The unwarrantedly narrow interpretation given to exemption 2 by the court of appeals in this case would severely limit the confidentiality of agency documents Congress intended to protect.

[5] H. Rep. No. 1197, 89th Cong., 2d Sess., p. 10; Hearings before a Subcommittee of the House Committee on Government Operations, on H.R. 5012, *et al.* (Federal Public Records Law), 89th Cong., 1st Sess., p. 29; 112 Cong. Rec. 13659; *City of Concord* v. *Ambrose*, 333 F. Supp. 958 (N.D. Cal.); *Hawkes* v. *Internal Revenue Service*, 467 F. 2d 787, 795 (C.A. 6); *Cuneo* v. *Laird*, 338 F. Supp. 504 (D.D.C.), reversed on other grounds, 484 F. 2d 1086 (C.A.D.C.), certiorari denied *sub nom. Rosen* v. *Vaughn*, 415 U.S. 977.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.
CARLA A. HILLS,
Assistant Attorney General.
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DONALD ETRA,
Attorneys.

OCTOBER 1974.

APPENDIX A

United States Court of Appeals For the Second Circuit

No. 9—September Term, 1973

(Argued October 29, 1973 Decided *March 29, 1974.*)

Docket No. 73–1264

MICHAEL T. ROSE, CHARLES P. DIAMOND, EDITOR-IN-CHIEF, NEW YORK UNIVERSITY LAW REVIEW, LAWRENCE P. PEDOWITZ, FORMER EDITOR-IN-CHIEF, NEW YORK UNIVERSITY LAW REVIEW, PLAINTIFFS-APPELLANTS

against

DEPARTMENT OF THE AIR FORCE, ROBERT S. SEAMENS, JR., SECRETARY OF THE AIR FORCE, LIEUTENANT GENERAL ALBERT P. CLARK, USAF, SUPERINTENDENT OF THE UNITED STATES AIR FORCE ACADEMY, BRIGADIER GENERAL WALTER T. GALLIGAN, USAF, COMMANDANT OF CADETS, UNITED STATES AIR FORCE ACADEMY, MAJOR CHARLES E. HART, USAF, DEFENDANTS-APPELLEES

Before: MOORE, HAYS, AND FEINBERG, Circuit Judges

Appeal from decision of United States District Court for the Southern District of New York, Lloyd

F. MacMahon, *J.*, granting partial summary judgment to defendants in a lawsuit under the Freedom of Information Act, 5 U.S.C. § 552.

Reversed and remanded.

BARRINGTON D. PARKER, JR., New York, N.Y. (American Civil Liberties Union Foundation; John H. F. Shattuck, Melvin L. Wulf, Sanford Jay Rosen, on the brief), *for Plaintiffs-Appellants.*

LEONARD SCHAITMAN, Assistant Chief, Appellate Section, Department of Justice, Washington, D.C. (Harlington Wood, Jr., Assistant Attorney General; Donald Etra, Attorney, Department of Justice; Whitney North Seymour, Jr., United States Attorney for the Southern District of New York; William R. Bronner, Gerald A. Rosenberg, T. Gorman Reilly, Assistant United States Attorneys, on the brief), *for Defendants-Appellees.*

FEINBERG, *Circuit Judge:*

We are faced in this case with construing two of the exemptions in the Freedom of Information Act ("the Act"), 5 U.S.C. § 552, one of the many recent federal statutes that bring new and difficult cases into the federal courts.[1] As is frequently the case with such legislation, we have little to guide us in the way of precedent, and the brevity and generality of the statutory formulations leave much to be decided by the courts.

I

Appellant Michael T. Rose, a graduate of the United States Air Force Academy ("the Academy") was—at the time this complaint was filed—a third year student at the New York University Law School and

[1] See *Associated Indus. of N.Y.S., Inc.* v. *United States Dep't of Labor*, 487 F. 2d 342, 344–45 & n. 1 (2d Cir. 1973), and statutes cited therein.

a member of the Law Review. Together with other students and members of the Review, Rose has been conducting a survey of disciplinary systems at various Service Academies; the study is slated for publication in a forthcoming issue of the Review.[2] In order to document discussion of the Academy's Honor and Ethics Codes, Rose asked the Academy in autumn 1971 to give him copies of case summaries of Honor and Ethics Code adjudications, which were kept in the Academy's files. The Department of the Air Force refused on the ground that these summaries are exempted from compulsory release by 5 U.S.C. § 552 (b)(6), which permits an agency to withhold certain information to avoid unwarranted invasion of privacy.[3]

After exhausting his administrative remedies, Rose joined with appellants Charles P. Diamond and Lawrence B. Pedowitz (who were then, respectively, the current and former Editor-in-Chief of the Review) in this lawsuit under the Act to compel disclosure of the disputed items "with personal references or other identifying information deleted * * *." Judge Lloyd F. MacMahon of the United States District Court for the Southern District of New York granted appellees (collectively the Agency) summary judgment on the issue of the case summaries.[4] Although ultimately rul-

[2] Its tentative title is "The Administrative Adjudicatory Systems of the Service Academies: Constitutional Powers and Limitations."

[3] The Air Force also relied on the corresponding Air Force Regulations, A.F.R. 12–30.4f and 12–30.4g(1)(b), 32 C.F.R. § 806.5 (f), (g)(1)(ii) (1972).

[4] The district court granted appellants summary judgment with regard to the third item requested, a complete study of resignations by Academy graduates from the Air Force. Appellees have already complied with this portion of the court's directive, and thus do not appeal from it.

ing against appellants, the judge agreed with them in large part. The Agency put forth two grounds in the district court to support its non-production of the documents: the Act's "personal privacy" exemption, referred to above, and the court's "equitable discretion" to deny disclosure. The judge rejected both arguments. However, he ruled for appellees on a third ground not advanced by them, that the summaries were covered by the exemption in 5 U.S.C. § 552(b)(2) for an agency's internal rules and practices. Attacking the district court's order refusing them access to the summaries, appellants prosecute this appeal. We reverse and remand for further proceedings conforming with this opinion.

II

We begin by stressing that the Freedom of Information Act [5] was passed in an effort to cure the defects of former section 3 of the Administrative Procedure Act ("APA"), 5 U.S.C. § 1002 (1964), which "was generally recognized as falling far short of its disclosure goals and came to be looked upon more as a withholding statute than a disclosure statute." [6] Courts have noted that the Act's remedial purpose was to pierce the veil of administrative secrecy and to open agency action to the light of public scrutiny. See, e.g.,

[5] 80 Stat. 250 (1966), codified by 81 Stat. 54 (1967), 5 U.S.C. § 552.

[6] *Environmental Protection Agency* v. *Mink*, 410 U.S. 73, 79 (1973). See also S. Rep. No. 813, 89th Cong., 1st Sess. 3, 4–6 (1965) [hereinafter Senate Rep.]; H.R. Rep. No. 1497, 89th Cong., 2d Sess. 4–6 (1966) [hereinafter House Rep.]; Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act, quoted in 20 Admin. L. Rev. 263–316, at 267–68 (1968). See generally Note, The Freedom of Information Act: Shredding the Paper Curtain, 47 St. John's L. Rev. 694 (1973) [hereinafter St. John's Note].

Haukes v. *Internal Revenue Service*, 467 F. 2d 787, 791 (6th Cir. 1972); *Bristol-Myers Co.* v. *FTC*, 424 F. 2d 935, 938, (D.C. Cir.), cert. denied, 400 U.S. 824 (1970). They have accordingly held that exemptions must be narrowly construed. *Vaughn* v. *Rosen*, 484 F. 2d 820, 823 (D.C. Cir. 1973), cert. denied, 42 U.S.L.W. 3520 (U.S. March 19, 1974); *Soucie* v. *David*, 448 F. 2d 1067, 1080 (D.C. Cir. 1971). This liberal reading of the Act's disclosure provisions is supported not only by legislative history but, more importantly, by the statutory language, as well. The Act mandates release of documents to "any person" [7] (subject to explicitly defined exemptions),[8] grants to the district courts jurisdiction to enjoin improper withholding after a hearing "de novo" in which "the burden is on the

[7] Former section 3 of the APA, 5 U.S.C. § 1002 (1964), provided for disclosure only "to persons properly and directly concerned." Davis, The Information Act: A Preliminary Analysis, 34 U. Chi. L. Rev. 761, 765 (1967) [hereinafter Davis].

[8] 5 U.S.C. § 552(b) lists the exemptions from compulsory disclosure. It states: "This section does not apply to matters that are—(1) specifically required by Executive order to be kept secret in the interest of the national defense or foreign policy; (2) related solely to the internal personnel rules and practices of an agency; (3) specifically exempted from disclosure by statute; (4) trade secrets and commercial or financial information obtained from a person and privileged or confidential; (5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency; (6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy; (7) investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency; (8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or (9) geological and geophysical information and data, including maps, concerning wells."

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agency to sustain its action," 5 U.S.C. § 552(a)(3); and further calls for disclosure "except as *specifically* stated in this section." 5 U.S.C. § 552(e) (emphasis added).[9] With this background in mind, we turn to a discussion of the applicability of Exemption Two, 5 U.S.C. § 552(b)(2), the provision thought by the district court to support the Agency's refusal to turn over the contested summaries to appellants.

As already indicated, until the district court ruled none of the appellees had thought to rely on Exemption Two in refusing to turn over the case summaries. That section of the Act, see note 9 supra, shields from required disclosure all "matters that are * * * related solely to the internal personnel rules and prac-

[9] 5 U.S.C. § 552(a)(3) reads as follows: "Except with respect to the records made available under paragraphs (1) and (2) of this subsection, each agency, on request for identifiable records made in accordance with published rules stating the time, place, fees to the extent authorized by statute, and procedure to be followed, shall make the records promptly available to any person. On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo and the burden is on the agency to sustain its action. In the event of noncompliance with the order of the court, the district court may punish for contempt the responsible employee, and in the case of a uniformed service, the responsible member. Except as to causes the court considers of greater importance, proceedings before the district court, as authorized by this paragraph, take precedence on the docket over all other causes and shall be assigned for hearing and expedited in every way." 5 U.S.C. § 552(c) provides: "This section does not authorize withholding of information or limit the availability of records to the public, except as specifically stated in this action. This section is not authority to withhold information from Congress."

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tices of an agency * * * ." In some instances, the scope of the exemption may be open to considerable doubt since the Senate and House Reports diametrically clash.[10] The former cites as examples of excluded material "rules as to personnel's use of parking facilities or regulation of lunch hours, statements of policy as to sick leave, and the like." Senate Rep. 8. The latter, on the other hand, exempts from disclosure "[o]perating rules, guidelines, and manuals of procedure for Government investigators or examiners" but not "'matters of internal management such as employee relations and working conditions and routine administrative procedures * * *.'" House Rep. 10. The Senate Report is thought by many to comply with the statutory language better than the House Report, whose thrust is most frequently toward nondisclosure.[11] This court has not yet taken a firm stand on the issue Cf. *Frankel* v. *SEC*, 460 F. 2d 813, 816 & n.5, cert. denied, 409 U.S. 889 (1972); *Polymers, Inc.* v. *NLRB*, 414 F. 2d 999, 1006 (1969), cert. denied, 396 U.S. 1010 (1970). We conclude, however, that the difference of approach between the House and Senate Reports would not affect the result here.

If we adopt the Senate construction of Exemption Two, case summaries of Honor and Ethics Code adjudications clearly fall outside its ambit. Such sum-

[10] See generally Project, Federal Administrative Law Developments—1972, Developments Under the Freedom of Information Act—1972, 1973 Duke L.J. 178, 187–89 [hereinafter Duke Project]; St. John's Note 716–17; Davis 785–86.

[11] Davis 762–63, 785–86; St. John's Note 697. See *Hawkes* v. *Internal Revenue Service*, 467 F. 2d 787, 794 (6th Cir. 1972), pointing out, inter alia, that the Senate Report furnishes the surer guide to congressional intent since it alone was before both Houses (the Senate passed the bill first); *Getman* v. *NLRB*, 450 F. 2d 670, 673 n.8 (D.C. Cir. 1971), and cases cited therein.

maries have a substantial potential for public interest outside the Government. Appellants have drawn our attention to various items such as newspaper excerpts, a press conference by an Academy officer and a White House Press Release, which illustrate the extent of general concern with the working of the Cadet Honor Code. As the press conference and the Press Release show, some of the interest has been generated—or at least enhanced—by acts of the Government itself. Of course, even without such official encouragement, there would be interest in the treatment of cadets, whose education is publicly financed and who furnish a good portion of the country's future military leadership. Indeed, all sectors of our society, including the cadets themselves, have a stake in the fairness of any system that leads, in many instances, to the forced resignation of some cadets. The very study involved in this case bears additional witness to the degree of professional and academic interest in the Academy's student-run system of discipline. Moreover, as we later describe in greater detail, see Part III infra, the case summaries themselves have great impact on the lives and careers of subject cadets. Both of these factors—the legitimate public interest and the future effect on cadets—differentiate the summaries from matters of daily routine like working hours, which, in the words of Exemption Two, do relate "*solely* to the internal personnel rules and practices of an agency." [Emphasis added.]

Similarly, even the House Report, which is usually more agency-oriented, does not sanction withholding the summaries. As we have already noted, the House Report in this respect seems to permit greater disclosure of "matters of internal management," except where knowledge of administrative procedures might

help outsiders to circumvent regulations or standards.[12] Release of the summaries, which constitute quasi-legal records, poses no such danger to the effective operation of the Codes at the Academy.

Speculating about a different kind of threat to the effectiveness of the Code, the Agency claims that publication of this material might gravely undermine the whole basis of the Honor Code system, whose proceedings are cloaked in confidentiality. The matter of confidentiality is further discussed in Part III infra. It is enough here to point out that appellants have sought only "sanitized" versions of the case summaries with names "or other identifying information" removed. In response to the redaction point, the Agency argues "that there is no way in which the total success of the deletion process can be guaranteed" and that "the functioning of the Honor and Ethics Codes would be seriously impaired even if inadvertent disclosure is a mere possibility."[13] But "total success"—in editing, as in anything else—is an impossible standard and surely not one imposed by a statute based upon a general philosophy of full agency disclosure to the public. Given this policy, as well as the injunction to construe exceptions to the Act strictly, 5 U.S.C. § 552(c), we think it clear that the Agency's withholding of the case summaries (as edited to preserve anonymity) cannot be upheld by reliance on the second exemption.

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[12] See, e.g., *Tietze* v. *Richardson*, 342 F. Supp. 610 (S.D. Tex. 1972) (Social Security claims processing guidelines); *Cuneo* v. *Laird*, 338 F. Supp. 504 (D. D.C. 1972) ("play-book" parts of contract audit manual), remanded sub nom. *Cuneo* v. *Schlesinger*, 484 F. 2d 1086 (D.C. Cir. 1973); *Concord* v. *Ambrose*, 333 F. Supp. 958, 960 (N.D. Cal 1971) (law enforcement agent training manual) (dictum).

[13] Appellees' brief at 26 & n.9.

III

The Agency also argues that the summaries sought by appellants fall within the purview of Exemption Six of the Act, 5 U.S.C. § 552(b)(6), which covers "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy * * *." As already indicated, Judge MacMahon did not agree with appellees on this point, but they renew their argument in this court. On its face, Exemption Six appears relevant; we are dealing here with "personnel" or "similar files." But the key words, of course, are "a clearly unwarranted invasion of personal privacy," a wholly conclusory phrase, which requires a court to apply the statutory standard without any definite guidelines. Under these circumstances, precedent lends only marginal aid. Each case involves an essentially unique investigation into the nature of the privacy interest invaded and the extent of the proposed invasion, viewed in the light of contemporary mores and sensibilities as applied to the particular facts.

The data pertinent to our inquiry concern the characteristics and use of the Honor and Ethics Code case summaries. These, the Agency tells us, are extracts of the significant facts in each case heard by the Honor Committee and in some important cases heard by the Ethics Committee. (The Ethics program is administered more informally.) As a matter of custom and procedure, information regarding such cases is required to be held in the strictest confidence. The summaries are, however, posted in the forty squadrons and, upon their official release, Honor Representatives are permitted to discuss any feature of the cases with the cadets for their education. The documents are also distributed to Academy personnel

who have a "need to know." (In not guilty or so-called "discretion"[14] cases the name of the accused is deleted; in guilty cases it is not.) Therefore, in practice, the curtain of confidentiality appears to shield these records from the glare of external publicity but not from the eyes of present cadets—and future ones, who can read the summaries of past proceedings in the Honor and Ethics Code reading files.

These being the facts, one might ask in what way release of the summaries—with names omitted—could increase the potential for invading the privacy of affected cadets. To be sure, some cases might be recognized by readers of the Law Review article even in the absence of names, by virtue of the circumstances alone. However, it can be argued, only current and former cadets and Academy official possess the frame of reference which would enable them to reconstruct the incidents described in the summaries, for only they had access to these records originally. Under these conditions, one might conclude that disclosure of the summaries poses no greater threat to privacy than the Academy itself countenanced through limited distribution and official posting of the items, and that it therefore constitutes no "invasion" at all. This reasoning was substantially the basis of the district court ruling that Exemption Six did not bar disclosure.

This approach, however, ignores certain practical realities. First, a person's privacy may be as effectively infringed by reviving dormant memories as by

[14] The Honor Reference Handbook of the Air Force Cadet Wing states that, by vote of six out of eight Honor Representatives, a cadet may be found guilty with discretion and returned to the Wing in good standing. A discretion vote indicates a "conviction that the man has learned a lifelong lesson and that he will thereafter uphold the ethical standards of the Wing." Honor Reference Handbook 44 (1970).

imparting new information.[15] Cf. Prosser on Torts 827–28 (4th ed. 1971). For example, a senior officer and ex-cadet might, upon reading a summary or a reference to it, realize for the first time that a man under his command had once been the subject of Academy discipline. It would be cold comfort to the junior officer to be told that his chief had always "known" this fact anyway, although he had long forgotten it or had never made the ultimate connection among various bits of knowledge until the article jogged his recollection.

Then, too, publication of even anonymous summaries could expose the histories of formerly accused cadets to persons other than Air Force officers. Despite the continuing injunction of secrecy, no one can guarantee that all those who are "in the know" will hold their tongues, particularly years later when time may have eroded the fabric of cadet loyalty. Finally, we must remember that none of the parties to this lawsuit is committed first and foremost to the interests of affected cadets. It is no slur on appellees to note that they are primarily defending the integrity of their own procedures while appellants, of course, are pressing for disclosure. In these circumstances, we will not hold that the Agency's internal dissemination of the summaries lessens the concerned cadets' right to privacy, as embodied in Exemption Six.

However, while release of even nameless case histories might constitute an "invasion" of protected interests, the inquiry does not end there. The statute

[15] But cf. A.F.R. 12–30.g(2)(a), 32 C.F.R. § 806.5(g)(2): "In determining whether the release of information would result in a clearly unwarranted invasion of privacy, consideration should be given, in cases such as those involving alleged misconduct, to: (i) The amount of time that has passed since the alleged misconduct * * *."

requires the Agency to show that the invasion is "unwarranted"—indeed, that it is "clearly" so. The only opinion at all in point, *Getman* v. *NLRB*, 450 F. 2d 670 (D.C. Cir. 1971), held that law professors engaged in an NLRB voting study could compel that agency to provide them with names and addresses of eligible employee voters since disclosure would not entail an impermissible intrusion into privacy.[16] But *Getman* was a much stronger case for plaintiffs than ours since release of the desired information would subject the employees named to nothing more than a telephone request to submit to a voluntary interview. 450 F. 2d at 674–75. Here, by contrast, identification of disciplined cadets—a possible consequence of even anonymous disclosure—could expose the formerly accused men to lifelong embarrassment, perhaps disgrace, as well as practical disabilities, such as loss of employment or friends. Viewing this potential for serious harm from the perspective of our society's expanding concern for the protection of privacy, cf. *Roe* v. *Wade*, 410 U.S. 113 (1973), we refuse to hold that appellees must now, without any prior inspection by a court, turn over the summaries to appellants with only the proper names removed. Such a procedure—posing, as it does, grave risks to the reputations of affected cadets—might "constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6).

In order to keep faith with the Act's overall mandate, however, we equally decline to hold at this time

[16] See Note, Invasion of Privacy and the Freedom of Information Act: *Getman* v. *NLRB*, 40 Geo. Wash. L. Rev. 527 (1972). We have found only three other appellate decisions dealing with Exemption Six, only one of which—*Robles* v. *Environmental Protection Agency*, 484 F. 2d 843 (4th Cir. 1973)—reaches the merits of the claim. Cf. *Ackerly* v. *Ley*, 420 F. 2d 1336 (D.C. Cir. 1969): *Tuchinsky* v. *Selective Serv. Sys.*, 418 F. 2d 155 (7th Cir. 1969).

that Exemption Six Covers all, or any part of, the summaries in issue. Rather, we follow appellants' alternative suggestion and remand with instructions to the district court to conduct an in camera inspection of the Honor and Ethics Code case histories, which it has never examined. *Hawkes* v. *Internal Revenue Service,* 467 F. 2d 787 (6th Cir. 1972); *Soucie* v. *David,* 448 F. 2d 1067 (D.C. Cir. 1971); *Bristol-Myers Co.* v. *FTC,* 424 F. 2d 935 (D.C. Cir.), cert. denied, 400 U.S. 824 (1970). Under 5 U.S.C. § 552(a)(3), see note 9 supra, the "burden" was on the Agency "to sustain its action" in failing to make the case summaries available. Having failed to carry that burden of justification under Exemption Six in the trial court by means of affidavits or testimony, the Agency must now produce the summaries themselves in court. *Environmental Protection Agency* v. *Mink,* 410 U.S. 73, 93 (1973), and cooperate with the judge in redacting the records so as to delete personal references and all other identifying information. Cf. 5 U.S.C. § 552(a)(2).[17] The practice of furnishing abstracts of cases, while preserving anonymity, is not unknown to the law.[18] We think it highly likely that the combined skills of court and Agency, applied to the summaries,[19] will yield edited documents sufficient for the purpose sought and sufficient as well to safeguard affected persons in their legitimate claims of privacy.[20]

[17] This section, which requires, inter alia, publication of final opinions, statements of policy and administrative staff manuals, contemplates agency deletion of identifying details "[t]o the extent required to prevent a clearly unwarranted invasion of personal privacy * * *."

[18] See, e.g., Revenue Rulings collected in Cum. Bull. of the IRS: ABA, Opinions on Professional Ethics (1967).

[19] It was estimated at oral argument that there were 100–200 summaries.

[20] Cf. House Rep. 11: "The exemption [six] is * * * intended

We cannot close this section of the opinion without one further comment. We have read our brother Moore's dissent with a sense of wonderment, since it states that we place our "stamp of approval upon" an "egregious invasion of constitutional rights of privacy." We, of course, do no such thing. We have refused to hold, in the third paragraph before this one, that the Agency is required, without any prior inspection by a court, to turn over the summaries to appellants with only the proper names removed. In addition, we have stated immediately above that personal references and all other identifying information should be deleted from the case summaries. If, in the opinion of the district judge, this is not sufficient to safeguard privacy, then the summaries should not be disclosed to appellants. Obviously, the problem would be a simple one if the Freedom of Information Act did not exist or if the only interest to be considered were that of the cadets. But construing Exemption Six is a much more complex process than is indicated by the dissent which fails to refer to the legislative history of the Act, the policy behind it or the cases construing it. In any event, we believe that the in camera procedure required here will further the statutory goal of Exemption Six: a workable compromise between individual rights "and the preservation of public rights to government information." House Rep. 11.[21]

to cover detailed Government records on an individual which can be identified as applying to that individual and not the facts concerning the award of a pension or benefit or the compilation of *unidentified statistical information from personal records.* [Emphasis added.]

[21] Moreover, despite the dissent's gloomy prediction, we do not envision a need for dozens of hours of hard labor by judicial and military officers. On the contrary, once agreement is reached on general principles of reduction, the actual process of editing the summaries should not take undue amounts of time.

IV

As a final point, the Agency contends that the courts have a broad equitable power to decline to order release when disclosure would damage the public interest, and urges that we exercise this jurisdiction to withhold the summaries completely. Judge MacMahon rejected this argument, holding that Congress did not leave to the courts a general option of refusing to enforce the Act's requirement of disclosure even though no statutory exemption applies.

Much ink has been spilled on this issue, both by courts and commentators, and we are told that the legislative history is indeterminate [22] and that the appellate decisions are divided.[23] We are not sure how real the conflict is in most instances, since even the courts that are cited as opposing the notion of general equity power to refuse disclosure recognize that a truly exceptional case might require it. *Tennessean*

[22] Compare House Rep. 9 with Senate Rep. 3.

[23] Thus, Duke Project 178–79 n.9 states that the Fourth, Sixth and D.C. Circuits reject the idea of a general equitable jurisdiction and the Fifth and Ninth Circuits support it. Compare *Robles* v. *Environmental Protection Agency*, 484 F. 2d 843, 847 (4th Cir. 1973); *Tennessean Newspapers, Inc.* v. *Federal Housing Administration*, 464 F. 2d 657, 661–62 (6th Cir. 1972); *Hawkes* v. *Internal Revenue Service*, 467 F. 2d 787, 792 n.6 (6th Cir. 1972); *Wellford* v. *Hardin*, 444 F. 2d 21, 24–25 (4th Cir. 1971); *Getman* v. *NLRB*, 450 F. 2d 670, 677–80 (D.C. Cir. 1971); *Soucie* v. *David*, 448 F. 2d 1067, 1076–77 (D.C. Cir. 1971), with *Wu* v. *National Endowment for Humanities*, 460 F. 2d 1030, 1034 (5th Cir. 1972), cert. denied, 410 U.S. 926 (1973); *Benson* v. *General Serv. Administration*, 415 F. 2d 878 (9th Cir. 1969). But cf. *Epstein* v. *Resor*, 421 F. 2d 930, 933 (9th Cir.), cert. denied, 398 U.S. 965 (1970) (limited role of courts under the first and third exemptions). Prof. Davis also believes in the existence of equitable power to refuse disclosure. Davis 767.

Newspapers, Inc. v. *Federal Housing Administration*, 464 F. 2d 657, 662 (6th Cir. 1972); *Soucie* v. *David*, 448 F. 2d 1067, 1077 (D.C. Cir. 1971). It may be that the true controversy is over the definition of an exceptional case, since we are clear that generally the Act constrains the use of broad judicial discretion to *block* disclosure. Cf. *Renegotiation Board* v. *Bannercraft Clothing Co.*, 42 U.S.L.W. 4203, 4206–09 (U.S. Feb. 19, 1974) (dictum—broad equitable power to enforce the Act). In any event, in the context of Exemption Six the issue is not a substantial one, since the language of the exemption requires a court to exercise a large measure of discretion. This was pointed out by the Court of Appeals for the District of Columbia, a court frequently cited for the view that the federal courts have no general equitable jurisdiction to refuse disclosure when no exemption applies:

> Any discretionary balancing of competing interests will necessarily be inconsistent with the purpose of the Act to give agencies, and courts as well, definitive guidelines in setting information policies * * *. But Exemption (6), by its explicit language, calls for such balancing and must therefore be viewed as an exception to the general thrust of the Act. S. Rep. at 9, explains:
>
> "The phrase 'clearly unwarranted invasion of personal privacy' enunciates a policy that will involve a balancing of interests between the protection of an individual's private affairs from unnecessary public scrutiny, and the preservation of the public's right to governmental information. The application of this policy should lend itself particularly to those Government agencies where persons are required to submit vast amounts of personal data usually for limited purposes. * * *"

> We note in passing that no other exemption specifically requires balancing. In view of the Act's basic purpose to limit discretion and encourage disclosure, we believe that Exemption (6) should be treated as unique, and that equitable discretion should not be imported into any of the other exemptions * * *.

Getman v. *NLRB*, 450 F. 2d 670, 674 n. 10 (1971).

We have already decided that disclosure of the case summaries would not be "a clearly unwarranted invasion of personal privacy" under Exemption Six, if the summaries are redacted as set forth above. We agree with the court in *Getman* that no further balancing is necessary.[24]

Accordingly, we reverse and remand for further proceedings, consistent with this opinion and expedited pursuant to the command of 5 U.S.C. § 552 (a)(3).

MOORE, *Circuit Judge* (dissenting):

I must express a most vigorous dissent to the majority's judicial stamp of approval upon the egregious invasion of constitutional rights of privacy which their opinion authorizes. At a time when the courts are more and more being called upon to protect an individual's character from being unnecessarily besmirched, when much is being said and written about prison rehabilitation, I am amazed that any court should countenance—much less authorize—the curiosity satisfying efforts of three law school students who, merely to write a Law Review note, would

[24] While this case was under advisement, we asked the parties to brief the question of mootness, in view of the possibility that publication of plaintiffs' article would moot the issue. In their response, both sides affirmed their belief that the matter of disclosure of the case summaries was still properly before us. We agreed with this conclusion and therefore proceeded to consider the case on the merits.

pry into and seek to disclose the former transgressions of Air Force cadets. This is not a case in which the courts can attempt to justify their interposition on the theory that Congress has failed to act and that, therefore, the courts must legislate. Here there is a definite statute of prohibition which the majority now overrides.

When an Air Force cadet is accused of lying, stealing or cheating at the Academy, he is protected by the greatest possible confidentiality. This may arise in part from the fact that this charge has been made possible by the principle of toleration which in grammar schoolyard parlance means "tattletale" or as phrased in the record as "The backbone of the Honor Code is the toleration clause which requires that every cadet report any suspected violation of the Code" (App. 120). Thus, not only must the cadet be protected but also the non-tolerator (tattler).

The hearings, as would be expected, are as sacrosanct as are (or should be) jury room proceedings, namely, "all matters discussed at the hearing are confidential and should not be discussed outside the room with anyone other than an Honor Representative" (App. 164–65). The summaries of each case are kept confidentially restricted except in a small area.

In Passing the Freedom of Information Act, 5 U.S.C. § 552, Congress carefully and specifically excluded from public gaze:

> "(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;"

If doctor-patient files are protected, how much the more should files dealing with quasi-criminal or possible character-besmirching facts be kept secret. The disclosure of disease, be it venereal or mental, can be

remedied or cured. The drawing of a bar sinister across the escutcheon of a young man entering upon his life's career, cannot be erased.

The Air Force officials, mindful of their duty to protect their cadets, responded in a manner which should have received the highest judicial commendation instead of disapproval. The Academy's Honor and Ethics Executive, in rejecting plaintiffs' request for the case summaries, stated:

> "I regret that Academy policy requires denial of public access to honor case files, including selected ones in the Honor Code Reading Files. All of these cases are documented as 'For Official Use Only' and are disseminated for internal use only to the Honor Representatives and those few staff personnel who have a continuing need to understand the working of the Cadet Honor Code. It would be in poor faith with all cadets who have met honor hearings to allow their cases to come into the public eye. To permit the use of honor cases for such purpose would tend to set a precedent that may operate to the detriment of innocent persons.
>
> "To be accused or found guilty of an honor violation is an emotionally trying experience that should, in due respect for the rights of the individual concerned, be as limited as possible. Society in general does not understand the difference in the lying, cheating and stealing that constitutes a Cadet Honor violation as opposed to the degree of criminality required in society at large to cause an equally serious type of censor [sic: censure]. The problems of such misunderstanding and the unnecessary embarrassment that could result seems to exceed the value to be gained from making the case files available to the public."

In denying the request, the Commandant of Cadets stated (App. 30):

> "The Air Force Academy will be unable to provide you sample ethics cases. The sample ethics cases used in the Honor Code Reading File are designated 'For Official Use Only'. It is intended that these cases will be used for the edification of the Cadet Wing and Academy staff only. Indiscriminate release of this information to persons without a need to know could be counter to the best interest of the individuals concerned and the Air Force Academy."

When the request reached the Office of the Secretary of the Air Force, the futility of any attempted deletion was pointed out in the statement (App. 35):

> "A release of the honor hearing cases and ethics cases would constitute an unwarranted invasion into the privacy of former cadets of the Academy. Some cases may be recognized by the reader by the circumstances alone without the identity of the cadet given. This being the case then the reader could easily connect the incident with the particular cadet involved. Additionally, they are internal documents which are not meant for mass circulation. They are stamped 'For Official Use Only' and are afforded subscribed routing and handling procedures."

The reasons for confidentiality and non-disclosure cannot be better summarized than by the Commandant's Executive for Honor and Ethics, who stated:

> "There is no way of determining just how these facts will or could be used. This data could find its way to the relatives, friends and classmates of cadets and supply the missing link in disclosing the identity of a guilty cadet. No person who has made a mistake and been punished should have to have this mistake follow him for the rest of his life."

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And, indeed, merely to satisfy the desire of plaintiff to write a Law Review note, no court should aid and abet a project which could result in having a cadet's "mistake follow him for the rest of his life." (App. 211a).

Deletion of names suggested by the majority would be of no avail. In addition to names, identifiable facts would have to be eliminated. Eliminating all determinative essentials would only create a hypothetical situation.

As the Commandant of Cadets so logically explained:

> "The use of these case files or write-ups, even if the identity of the individual were not given, could still be an invasion of privacy as the incident may have been so notorious that the reader would immediately recognize the cadet who was the subject of the Honor or Ethics Hearing. In certain instances, the Cadet Wing has given the Honor Committee the prerogative to grant discretion to a cadet who has been voted guilty and to allow him to return to the Cadet Wing. The man who has learned his lifelong lesson of honor can be a great asset to the Wing and to the Air Force. His retention is therefore not only justified; it is desired. . . . Therefore, every effort is made to avoid disclosure of the cadet's name so that he may return to the Wing unblemished to continue his education."

The majority recognize that their decision even with anonymous disclosure "could expose the formerly accused men to lifelong embarrassment, perhaps disgrace, as well as practical disabilities, such as loss of employment or friends." These accused cadets are the real parties in interest; yet, as the majority concedes, "none of the parties to this lawsuit is committed first and foremost to the interests of affected cadets." Even the unborn child is in many situations entitled to his

(or her) guardian *ad litem* and *Gideon*[25] was deemed to be entitled to be heard through counsel. But accused cadets are to be subjected to possible lifelong disgrace or loss of employment without any spokesman.

Of course, Congress never intended any such result. Nor does the Act so decree. Lest any implication to this effect might be gleaned therefrom, Congress wrote therein a specific prohibition against an "unwarranted invasion of personal privacy."

Consider briefly the majority's suggested protection against "this potential for serious harm". First, the Air Force must remove from all case summaries, estimated in open court as involving one hundred to two hundred summaries, all proper names. Then these nameless but not factless summaries are to be turned over to the District Court. There the majority are sure that "the combined skills of court and Agency, * * * will yield edited documents * * * sufficient * * * to safeguard affected persons in their legitimate claims of privacy." But for what purpose and at what cost? The purpose is clear, i.e., to have the Air Force and the District Court co-author a student contribution to a legal periodical. Time cost is another matter. Assuming only one hundred and fifty summaries, vital name excision should be capable of accomplishment in ten minutes per summary—an inconsequential twenty-five hours. However, careful Court editing to eliminate identifying facts would be much more time-consuming. Seventy-five hours of Court time would be conservative. In these days when there is so much clamor about the desirability of speedy trials, I am unwilling to subscribe to, or acquiesce in, any opinion which saddles such a needless burden upon an important branch of our military forces and, in my opinion, an equally important judicial branch. Hence, I dissent.

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[25] *Gideon* v. *Wainwright*, 372 U.S. 335 (1963).

APPENDIX B

United States Court of Appeals, Second Circuit

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 29th day of May, one thousand nine hundred and seventy-four.

MICHAEL T. ROSE, CHARLES P. DIAMOND, EDITOR-IN-CHIEF, NEW YORK UNIVERSITY LAW REVIEW, LAWRENCE B. PEDOWITZ, FORMER EDITOR-IN-CHIEF, NEW YORK UNIVERSITY LAW REVIEW, PLAINTIFFS-APPELLANTS

v.

DEPARTMENT OF THE AIR FORCE, ROBERT C. SEAMENS, JR., SECRETARY OF THE AIR FORCE, LIEUTENANT GENERAL ALBERT P. CLARK, USAF, SUPERINTENDENT OF THE UNITED STATES AIR FORCE ACADEMY, BRIGADIER GENERAL WALTER T. GALLIGAN, USAF, COMMANDANT OF CADETS, UNITED STATES AIR FORCE ACADEMY, MAJOR CHARLES E. HART, USAF, DEFENDANTS-APPELLEES

Docket No. 73–1264

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the appellees, a poll of the judges in regular active service having been taken and there being no majority in favor thereof.

Upon consideration thereof, it is ordered that said petition be and it hereby is denied.

IRVING R. KAUFMAN,
Chief Judge.

United States Court of Appeals

Second Circuit

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 29th day of May, one thousand nine hundred and seventy-four.

Present: Hon. Leonard P. Moore, Hon. Paul R. Hays, Hon. Wilfred Feinberg, Circuit Judges.

MICHAEL T. ROSE, CHARLES P. DIAMOND, EDITOR-IN-CHIEF, NEW YORK UNIVERSITY LAW REVIEW, LAWRENCE B. PEDOWITZ, FORMER EDITOR-IN-CHIEF, NEW YORK UNIVERSITY LAW REVIEW, PLAINTIFFS-APPELLANTS

v.

DEPARTMENT OF THE AIR FORCE, ROBERT C. SEAMENS, JR., SECRETARY OF THE AIR FORCE, LIEUTENANT GENERAL ALBERT P. CLARK, USAF, SUPERINTENDENT OF THE UNITED STATES AIR FORCE ACADEMY, BRIGADIER GENERAL WALTER T. GALLIGAN, USAF, COMMANDANT OF CADETS, UNITED STATES AIR FORCE ACADEMY, MAJOR CHARLES E. HART, USAF, DEFENDANTS-APPELLEES

Docket No 73–1264

A petition for a rehearing having been filed herein by counsel for the appellees,

Upon consideration thereof, it is Ordered that said petition be and hereby is denied.

A. DANIEL FUSARO,
Clerk.

APPENDIX C

United States District Court Southern District of New York

72 Civ. 1605–LFM

MICHAEL T. ROSE ET AL., PLAINTIFFS

against

DEPARTMENT OF THE AIR FORCE ET AL., DEFENDANTS

Memorandum

MACMAHON, *District Judge.*

These cross-motions for summary judgment are brought under the public information section of the Administrative Procedure Act,[1] commonly known as the Freedom of Information Act of 1966 ("the Act"). Plaintiffs seek to compel the defendants to produce certain documents and information generated in the United States Air Force Academy ("the Academy") pertaining to its disciplinary procedures. Section 3 of the Act places upon defendants the burden of justifying their refusal to produce documents or information sought pursuant to the Act and provides for a de novo evaluation by this court of the propriety of that refusal.

The items of information sought are: (1) case summaries of Honor Code adjudications collected in the Academy's Honor Code reading files, with personal references or other identifying information deleted; (2) case summaries of Ethics Code adjudications

[1] 5 U.S.C. § 552 et seq.

maintained in the Academy's Ethics Code reading files, with personal references or other identifying information deleted; and (3) a complete copy of a study of resignations from the Air Force by Academy graduates made by the Academy's alumni secretary.[2]

Plaintiffs, members and a former member of the law review of New York University Law School, seek this information for use in documenting a study of disciplinary procedures at the nation's service academies. Plaintiff Rose, a graduate of the Academy and a first lieutenant in the Air Force, requested and was denied access to all items listed above for such use. The grounds stated for the denial were that the materials sought were exempt from disclosure under Air Force regulations and federal law.[3]

The Honor Code is a synonym for the manner in which each cadet at the Academy voluntarily agrees to conduct himself: "We will not lie, steal or cheat, nor tolerate among us anyone who does." All four aspects of the cadet Honor Code are punishable under formal military law.[4] The procedures of the Code, however, provide an informal system of military justice that must be utilized before any other sanctions may be invoked. The Code may completely dispose of

[2] Since the institution of this suit, the Air Force has released to plaintiffs the statistical portion of item (3): the comments offered by the graduates are still withheld.

[3] The case summaries are allegedly exempt from disclosure under Air Force Regulations 12–30, 4f and 4g(1)(b) and 5 U.S.C. § 552(b) (5) and (6).

[4] Specific articles of the UCMJ which could apply vary with the circumstances, but include Articles 80, 92, 107, 121, 122, 123, 133, and 134.

cases and, therefore, obviate the need to resort to formal military law.[5]

Ethics cases involve some conduct indicating a lack of moral character and yet not constituting an Honor Code violation, *e.g.*, the writing of a bad check.[6]

Plaintiffs contend that they have a right, pursuant to 5 U.S.C. § 552(a)(3), to inspect and copy the Honor

[5] The Code is administered by a board of eight cadets, known as "the Honor Committee." Suspected violations of the Code are referred to the Chairman of the Honor Committee. He appoints a three-cadet investigatory team which, with advice from the legal advisor, evaluates the facts and determines whether a hearing before the Honor Committee is warranted. If the team finds no hearing warranted, the case is closed. If it finds there should be a hearing, each squadron may send two cadets to observe and the accused cadet may call witnesses to testify in his behalf.

The Honor Committee may reach a finding of guilty only upon an unanimous vote. If the verdict is guilty, the board may, under certain circumstances, grant the guilty cadet "discretion" for which a vote of 6 to 2 is required. A verdict of guilty without discretion results in three alternatives: the cadet may resign from the Academy, request a hearing before a Board of Officers, or request a trial by court-martial. A verdict of guilty with discretion is equivalent to a not guilty finding in that the cadet is returned to the cadet population in good standing.

At the announcement of the verdict, the Honor Chairman reminds all cadets present at the hearing that all matters discussed at the hearing are confidential and should not be discussed outside the room with anyone other than an Honor Representative. In not guilty or discretion cases, case summaries are written up with the name of the cadet deleted and posted on bulletin boards throughout the Academy. However, cadets are instructed not to read them unless they have a need, beyond mere curiosity, to know their contents. In guilty cases, official dissemination to the cadets is made after the guilty cadet has departed and his name is not deleted.

[6] Confidentiality of Ethics cases is established by custom and practice rather than by written rule. The procedures for handling Ethics cases are comparatively unstructured. In many

and Ethics Codes case summaries ("case summaries"). That statute requires that:

> [E]ach agency, on request for identifiable records * * * shall make the records promptly available to any person. On complaint, the district court * * * has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo and the burden is on the agency to sustain its action.[7]

The government argues preliminarily that the Honor Committee and presumably the Ethics Committee (which administer the respective Codes) are not agencies within the intendment of the Act. We disagree. A branch of the armed services is an agency for the purposes of the Act.[8] The identification of Honor Code memoranda as "official Air Force records" by the Air Force's form of attestation of authenticity[9] demonstrates that the records belong to the Air Force and not to the Honor Committee.

The government's primary defense to the demands

instances, Ethics cases are handled informally by the Cadet Squadron Commander, the Squadron Ethics Representative, and the individual concerned. These cases are not necessarily written up and no complete file is maintained. A case is written up and placed in back of the Honor Code reading file only when it is determined to be of value for the Cadet population. For our purposes here, references to the Honor Code or Code will include the Ethics Code.

[7] 5 U.S.C. § 552(a)(3).

[8] *Epstein* v. *Resor*, 421 F. 2d 930 (9th Cir.), *cert. denied*, 398 U.S. 965 (1970).

[9] These official printed forms, complete with blue ribbon and gold seal, cover a number of Air Force documents submitted in support of the government's motion.

for the case summaries is the sixth of nine exemptions to the Act:

> (b) This section does not apply to matters that are—
>
> * * * * *
>
> (6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy * * *.[10]

Plaintiffs respond that their request is for the case summaries "with personal references or other identifying information deleted." Revelation of a set of facts absent some type of association with a person's name seems to us incapable of invading anyone's personal privacy.[11] It is only the identifying connection

[10] 5 U.S.C. § 552(b)(6). The government contends that the "information is both embarrassing and personal to the individual concerned and that the Air Force had a duty to respect, to the greatest extent possible, the rights of privacy of its personnel." Affidavit of Major Richard R. Lee, faculty member of the Academy, at page 2. The government then cites as relevant legislative history: "Such agencies as the Veterans' Administration, Department of Health, Education and Welfare, Selective Service, and Bureau of Prisons have great quantities of files containing intimate details about millions of citizens * * *. The limitation of a 'clearly unwarranted invasion of personal privacy' provides a proper balance between the protection of an individual's right of privacy and the preservation of the public's right to Government information by excluding those kinds of files the disclosure of which might harm the individual." H.R. Rep. No. 1497, 89th Cong., 2d Sess. 11 (1966) ("H. Rep."). The government stresses that since privacy is the "crucial" property of the Code, an adverse determination here would put the future of the Code in a "dubious" position as well as constitute a clearly unwarranted invasion of personal privacy.

[11] See, *Getman v. National Labor Relations Bd.*, 450 F. 2d 670 (D.C. Cir. 1971). The very section of the House Report cited by the government, which noted that this exemption was

to the individual that casts the personnel, medical and similar files within the protection of sixth exemption. The Act and courts following the Act, therefore, permit deletions of exempted portions of documents but then order the remainder to be released.[12]

The government argues that even with deletions, disclosure is an unwarranted invasion of personal privacy because:

> [T]here will be those, who, * * * may have considerable knowledge about a particular Code violation; perusal of the article * * * may well * * * provide the factual quantum necessary to identify a particular person as the one involved * * *. This would destroy the utility of the device of "discretion," the second chance with a clean slate.[13]

The government ignores, however, that the Honor Code precludes publication of any case summaries outside the Academy community. While it is possible that a reader, in conjunction with facts learned long since cadet days, might successfully conjecture about an

intended to cover "files containing intimate details about millions of citizens," goes on to state: "The exemption is also intended to cover detailed Government records on an individual which can be identified as applying to that individual and not the facts concerning the award of a pension or benefit or the compilation of unidentified statistical information from personal records." H. Rep. at 11. The corresponding Senate Report makes the point even more clearly: "[H]ealth, welfare, and selective service records are highly personal to the person involved, yet facts concerning the award of a pension or benefit should be disclosed to the public." S. Rep. No. 813, 89th Cong., 1st Sess. 7 (1965) ("S. Rep.").

[12] 5 U.S.C. § 552(a)(2): "To the extent required to prevent a clearly unwarranted invasion of personal privacy, an agency may delete identifying details * * *." *E.g.*, *Wellford* v. *Hardin*, 315 F. Supp. 768 (D. D.C. 1970); *see*, *Getman* v. *National Labor Relations Bd.*, *supra*.

[13] Government's reply memorandum, at p. 8.

identity if he had not learned it when he was at the Academy, no one can be harmed. This hypothetical reader, necessarily once a cadet, has subscribed to the nature and workings of the Honor Code, including the philosophy of discretion. Even if "society" deems case summaries to be of a quasi criminal nature, no stigma could attach to a former cadet because no one outside the cadet/former cadet universe could possibly connect a name with a case.

Thus, we find that disclosure of the summaries without names or other identifying information is not an invasion of personal privacy, as proscribed by the sixth exemption.[14]

The government next argues that we follow *Consumers Union of U.S., Inc.* v. *Veterans Administration*,[15] "according to traditional equity principles" to "weigh the effects of disclosure and non-disclosure and determine the best course to follow at the present time." This mandate of the district court in *Consumers* is rejected by the Courts of Appeals and is contradictory to the language of the statute. One court stated:

> Since judicial use of traditional equitable principles to prevent disclosure would upset this this legislative resolution of conflicting interests, we are persuaded that Congress did not intend to confer on district courts a general power to deny relief on equitable grounds apart from the exemptions in the Act itself.[16]

[14] It is unnecessary for us to proceed to the second step of the exemption of balancing the advantages to the public of disclosure with the disadvantages to the individual of intrusion because we have found that there could be no intrusion.

[15] 301 F. Supp. 796, 806 (S.D.N.Y. 1969), *appeal dismissed as moot*, 436 F. 2d 1363 (2d Cir. 1971).

[16] *Soucie* v. *David*, 448 F. 2d 1067, 1077 (D.C. Cir. 1971). *See also*, *Wellford* v. *Hardin*, *supra*; *Getman* v. *National Labor Relations Bd.*, *supra*.

Section 552(c) of the Act states:

> This section does not authorize withholding of information or limit the availability of records to the public, except as *specifically* stated in this section.[17]

The equitable discretion issue was neither briefed nor argued by either side in *Consumers*, and opportunity for a full review on the point was foreclosed when the appeal was dismissed as moot.[18] In any event, we are convinced that it is inappropriate to use equitable power to weigh the effects of disclosure and nondisclosure.[19]

Despite the failure of the two grounds discussed above to support the Air Force's attempt to keep from disclosing the case summaries, there exists a third potential basis not mentioned by either side which demands our consideration. The second exemption to the Act covers matters that are "related solely to the internal personnel rules and practices" of the agency.[20] The general frame of operation of the Honor and Ethics Codes, including the production of the case summaries, seems to fit into that category on its face. We, therefore, must examine whether such placement is consonant with congressional intent.

The Senate Report on the Act stated:

> Exemption No. 2 relates only to the internal personnel rules and practices of an agency. Examples of these may be rules as to personnel's use of parking facilities or regulation of lunch hours, statements of policy as to sick leave and the like.[21]

[17] 5 U.S.C. § 552(c) [emphasis added].

[18] *Getman* v. *National Labor Relations Bd.*, *supra*, 450 F. 2d at 678 n. 25.

[19] *Id.* at 674 n. 10.

[20] 5 U.S.C. § 552(b)(2).

[21] S. Rep. at 8. A portion of the House Report would seem to exclude "employee relations and working conditions" from

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The examples of "personnel rules" in the report indicates a policy of non-disclosure of information which does not materially affect the public. By definition, these rules are meant to control only those people in the agency. The administrative difficulties from publication outweigh any possible benefit from disclosure.

The operation of the Honor Code cannot possibly affect anyone outside its sphere of voluntary participation which is limited by its function and its publication to the Academy.[22] While the Code is more substantial than parking facilities or lunch hours, the principle of affecting only those in the agency is the same. The examples in the report are illustrative, not limitary, and consequently do not restrict the exemption beyond the principle that documents exempted do not materially affect the public.[23]

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the exemption. We reject this interpretation because it is not in accord with the expressed words of the statute. Moreover, the Senate Report is the surer indication of congressional intent because it was available for consideration in both houses while the House Report was available in only one. *Benson* v. *General Services Administration*, 289 F. Supp. 590 (D.D.C. 1968), *aff'd*, 415 F. 2d 878 (9th Cir. 1969).

Commentary on another portion of the House Report which expands the exemption to include operating rules is helpful, however, in that it points to the guideline we employ here in applying this exemption. "'Operating rules' may be 'internal personnel rules' only to the extent that they deal with the relations between an agency and an outsider or between employees of the agency and an outsider." Davis, The Information Act: A Preliminary Analysis, 34 U. Chi. L. Rev. 761, 785–786 (1967). Significantly for our purposes, the commentator warns that routine administrative procedures must be disclosed "if they affect anyone outside the agency." *Id*

[22] Even former cadets and former officers, as members of the public, cannot be affected by the case summaries due to the confidential nature of the Honor Code System. See notes 5 and 6 and text thereat.

We hold, therefore, that the Honor and Ethics Codes comprise rules and practices of the Air Force that affect only those within the Academy. Hence, the records of those proceedings, including the demanded case summaries, are exempt from mandatory disclosure under 5 U.S.C. § 552(b)(2).

The third item of information sought in this action is a complete study of resignations by Academy graduates. In view of the government's voluntary disclosure of the statistical half of this survey, we need only pass upon the half containing comments by Academy graduates.

The government maintains that the comments portion of the study is exempt from disclosure under the terms of the fifth exemption from the Act. It relieves from disclosure:

> inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency.[24]

Plaintiffs contend that this study already has been offered for dissemination to the public and, thus, the government has waived its rights under this exemption. We agree. Lieutenant General Albert P. Clark, the Superintendent of the Air Force Academy, stated that:

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[23] This interpretation is not foreclosed by the policy of construing exemptions narrowly. We can find no more narrow interpretation that would still permit the exemption to be viable. Protection from overly broad use of the exemption derives from the word "solely" in the statute, which narrows down the exemption to insure disclosure to the public of all information that may affect it. Here it is obvious that the Code exists "solely" to regulate the cadets.

[24] 5 U.S.C. § 552(b)(5).

> As a matter of fact the information [the study] has not been released to graduates or to the public for over a year.

It is uncontested that the complete survey was offered to all graduates at one time. Plaintiff Rose received a form letter, dated September 29, 1969, addressed to "All graduates" from the Academy offering the study to anyone who would "merely drop us a line." This letter from Captain Metcalf, author of the study, did not restrict the use of the study despite the assertion by Metcalf in his affidavit that the policy had been not to permit the use of the study in published reports. The entire relevant portion of the letter is set out in the margin.[25]

The government does not deny that the study was offered for public dissemination. In its reply brief, it contends that the studies originally were made available to all graduates as a matter of interest. In mid–1971, that policy was changed apparently because of a request for the study by a graduate in order to write an article for a national magazine.

In view of Lieutenant General Clark's attestation, it is inescapable that the study had in fact been distributed to at least some members of the public. Further, the admitted offer of release was not restricted to graduates still serving in the Air Force. Consequently, it is likely that the material remains available from sources other than the agency. Because of the other sources, the denial of disclosure here

[25] "5. The above discussion is only a short summary of the study that was published in May, 1969. If you wish a copy of the complete survey, merely drop us a line and we'll send one along. If you have any personal comments on the subject of graduate resignations, I would be very pleased to receive them. I would be particularly interested in your thoughts concerning actions Hq USAF can initiate that would directly address the major irritants of a career in the Air Force."

would either be ineffective or we would have to enjoin all holders of the study from disclosing it. As we are powerless to restrain the sources not before us, there is no effective way to keep the study secret.

The change and subsequent enforcement of the Air Force's policy regarding release of the study cannot undo the consequences of unrestricted publications. All reasons for exempting intra-agency communications from disclosure fail when that communication already has been deliberately released by the agency to the public. The study is no longer only an intra-agency matter. It is a matter of public record. A Maritime Subsidy Board intra-agency memorandum lost its status as such when it was reproduced in part in a letter sent outside the agency.[26]

We therefore find that the voluntary disclosure of the studies amounts to a waiver of the right to be protected by the fifth exemption.[27] Consequently, the exemption from disclosure claimed by the government must be denied.

[26] *American Mail Line, Ltd.* v. *Gulick*, 411 F.2d 696, 703 (D. D.C. 1969). We cannot be sympathetic to a litigant because his timing with the barn door is off; the horse needs only to be let go once to be gone forever.

[27] Because the Air Force waived the study's status as an intra-agency memorandum, we need not reach the second criterion of the fifth exemption: the discoverability of the study as to a litigant other than an agency. We do note, however, that the publication would not adversely affect a litigant's discovery rights. A discoverer is not barred from discovery on matters that are within his own mind, within the knowledge of the general public or accessible to him. *United States* v. *Beatrice Foods Co.*, 52 F.R.D. 14 (D. Minn. 1971); *Baim & Blank, Inc.* v. *Philco Distrib., Inc.*, 25 F.R.D. 86 (E.D.N.Y. 1957); 4 J. Moore, Federal Practice ¶ 26.59 (1972). Whether or not the publication itself overcomes any claim of privilege lodged by the government under the discovery rules, thus making the information "discoverable" even had it not been so before, is a most interesting but unnecessary question for us here.

Accordingly, the government's motion for summary judgment is granted insofar as it exempts the Honor and Ethics Codes case summaries from disclosure and is denied in all other respects. Plaintiffs' cross-motion for summary judgment is granted insofar as it seeks to require the Air Force to disclose the complete study on graduate resignation with comments and is denied in all other respects.

Settle order on notice within fifteen (15) days.

Dated: New York, N.Y., December 19, 1972.

LLOYD F. MACMAHON,
United States District Judge.

APPENDIX D

United States Court of Appeals for the Second Circuit

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-ninth day of March one thousand nine hundred and seventy-four.

Present: Hon. Leonard P. Moore, Hon. Paul R. Hays,
Hon. Wilfred Feinberg, *Circuit Judges*

MICHAEL T. ROSE, CHARLES P. DIAMOND, EDITOR-IN-CHIEF, NEW YORK UNIVERSITY LAW REVIEW, LAWRENCE B. PEDOWITZ, FORMER EDITOR-IN-CHIEF, NEW YORK UNIVERSITY LAW REVIEW, PLAINTIFFS-APPELLANTS,

v.

DEPARTMENT OF THE AIR FORCE, ROBERT C. SEAMENS, JR., SECRETARY OF THE AIR FORCE, LIEUTENANT GENERAL ALBERT P. CLARK, USAF, SUPERINTENDENT OF THE UNITED STATES AIR FORCE ACADEMY, BRIGADIER GENERAL WALTER T. GALLIGAN, USAF, COMMANDANT OF CADETS, UNITED STATES AIR FORCE ACADEMY, MAJOR CHARLES E. HART, USAF, DEFENDANTS–APPELLEES.

73–1264

Appeal from the United States District Court for the Southern District of New York

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the order and judgment of said District Court be and they hereby are reversed and that the action be and it hereby is remanded to said District Court for further proceedings consistent with the opinion of this court with costs to be taxed against the appellees.

A. DANIEL FUSARO,
Clerk.

By VINCENT A. CARLIN,
Chief Deputy Clerk.

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